Supreme Court, U.S.
FILED
JAN 15 1993
OFFICE OF THE CLERK

No. 92-1009

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

GREATER ANCHORAGE, INC.,

Petitioner

versus

VERNON NOWELL,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit properly concluded that there was not a likelihood that the public would be confused as to the source or sponsorship of Vernon Nowell's pins, as long as they are marketed and sold with the disclaimer language approved by the District Court?

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STATEMENT OF THE CASE

The essential facts (concisely summarized by the Ninth Circuit at appendix pp.3a-7a) are as follows: The Fur Rendezvous is a winter festival which is held in Anchorage, Alaska; the festivals were held for many years prior to the incorporation of Greater Anchorage, Inc. in 1956 and its

registration of the service mark "Fur Rendezvous" in 1976; Nowell owns one of the lapel pendants which was worn at the 1939 Fur Rendezvous Festival; this pendant has a picture of a wolf with the words "Fur Rendezvous Anchorage Alaska Feb. 18-21, 1939"; Nowell made a copyrighted photograph of the pendant and subsequently made a pin out of the photograph; Nowell began selling the pins and was then informed by Greater Anchorage of its service mark; Nowell consulted with a trademark attorney who prepared disclaimer language which was affixed to the pins; Nowell resumed sales and Greater Anchorage filed suit. The District Court concluded that the sale of the pins with the disclaimer language attached was not likely to "cause confusion, or to cause mistake, or to deceive" the public as to the source

or sponsorship of the pins. Appendix, pp20a-21a. The Ninth Circuit affirmed. Greater Anchorage, Inc. petitioned for writ of certiorari.

ARGUMENT

The use of disclaimers prevents any likelihood of confusion by the consuming public as to the source or sponsorship of Mr. Nowell's pins.

All of the decisions cited by Greater Anchorage recognize that the basic issue in cases involving trademark infringement is whether the public is likely to be confused about the source or sponsorship of the goods. See, for example, San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee, 483 U.S.522, 107 S.Ct. 2971 (1987), cited with approval at Appellant's Brief, p. 29. Both lower courts in this case found that, with the disclaimers (both on the

pin itself, and also on display at the point of sale), there is no reasonable likelihood that the public would be confused. Thus the Appellant's arguments concerning the Ninth Circuit's "functional trademark doctrine" miss the point: the real issue in this case is the propriety of the use of disclaimers, since without the disclaimers there is a likelihood of confusion, and with them there isn't.

Greater Anchorage, implicitly recognizing the fact that there is no likelihood of confusion with the disclaimers, contends that the use of disclaimers should be restricted to "very specific cases" to "balance equities". Appellant's brief, p. 33. Nowell agrees, and contends that this is such a specific case; Nowell has simply made a photograph of an historical artifact

which he owns, which artifact predates Appellant's service mark registration by almost four decades. Greater Anchorage should not, in equity, be allowed to appropriate history. The pin consuming public has a right to purchase a pin which includes a photograph of such an historical artifact, as long as it is done so in a manner which makes it clear that Greater Anchorage has not endorsed or sponsored the pin. The disclaimers accomplish this.

For the reasons stated herein, the petition for certiorari filed by Greater Anchorage, Inc. should be denied.

Respectfully submitted,

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January 13, 1993